No. 83-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LULA B. MILLER,

Petitioner,

v.

MERCY HOSPITAL, etc.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Does Rule 52(a), F.R.C.P., forbid the courts of appeals from reviewing the credibility findings of a trial judge?

PARTIES

The parties to this proceeding are Lula B. Miller and Mercy Hospital, Incorporated, of Charlotte, North Carolina.

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No. _____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Lula B. Miller respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 31, 1983.

OPINIONS BELOW

The decision of the court of appeals is reported at 720 F.2d 356, and is set out at pp. 19a-85a of the Appendix. The order denying rehearing, which is not reported, is set out at p. 86a. The district court's Memorandum of Decision of January 7, 1982, which is not reported, is set out at pp. 1a-3a of the Appendix. The district court's Supplemental Memorandum of Decision of February 24, 1982, which is not reported, is set out at pp. 4a-18a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1983. A timely petition for rehearing was filed, which was denied on December 7, 1983. On February 24, 1984, the Chief Justice granted an order extending the date on which the petition for writ of certiorari is due

until April 5, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon .... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses....

STATEMENT OF THE CASE

Petitioner commenced this action on February 22, 1979, in the United States District Court for the Western District of North Carolina. Petitioner alleged that the defendant Mercy Hospital had denied her employment as a Nurse's Aide on account of her race, in violation of Title VII of the 1964 Civil Rights Act. The case was tried

in January, 1982, by a federal district judge sitting without a jury.

Petitioner applied for work at Mercy Hospital on August 14, 1974. Although petitioner indicated on the written job application that she preferred a position as a Licensed Practical Nurse, she told the hospital's Assistant Personnel Director, Dillie Winchester, that she would accept the less well paid position of Nurse's Aide.[1/] Winchester indicated petitioner's interest in a Nurse's Aide job on the job application sheet itself, and noted on a related personnel form that "Lula Miller has applied to us for a position as 'N.A.' ....[2/] The hospital

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1/ 2a, 7a-8a.

2/ 8a, 23a, 24a. The court of appeals did not question the district court's finding that Marciniszyn had seen this form. 58a.

officials agreed that petitioner was entirely qualified for the position of Nurse's Aide. Petitioner had extensive prior experience in that position, and her previous employer advised Winchester that petitioner's work as a Nurse's Aide had been "very good."[3/] However, despite her qualifications,[4/] and the existence of vacancies for Nurse's Aides at Mercy Hospital, the hospital rejected her application. Petitioner claimed that she was rejected because the hospital knew she had filed a claim of racial discrimination against a previous employer.

The hospital offered in response to this prima facie case of discrimination a defense which rested entirely on the credibility of the defense witnesses. The

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3/ 8a, 9a, 24a.

4/ 2a.

actual decision to reject petitioner's application was made by a second personnel official, Casmira Marciniszyn. Marciniszyn testified, in response to questions by defense counsel, that she had rejected petitioner's application by mistake, erroneously believing that petitioner was only seeking, and would only accept, a position as a Licensed Practical Nurse.[5/] On cross examination, however, Marciniszyn admitted that she had no actual recollection of petitioner's application, but was merely speculating about why the application had been rejected.[6/] Marciniszyn's speculative explanation was directly contradicted by petitioner, who testified that Winchester had stated that petitioner's application had been rejected

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5/ 9a, 12a, 15a, 27a.

6/ 2a-3a, 9a, 11a-12a.

because of her problems with her previous employer.[7/]

The district court concluded that the reason articulated by the hospital for not hiring petitioner -- a mistake -- was pretextual.[8/] The trial judge emphasized that Marciniszyn conceded she could not in fact remember why she rejected petitioner's job application, and criticized Winchester's testimony as "general and weak".[9/] The judge characterized petitioner's testimony, on the other hand, as "direct, straightforward, and believable."[10/] The district court accordingly concluded that the hospital was guilty of discrimina-

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7/ 28a-29a.

8/ 15a, 18a.

9/ 2a.

10/ 3a, 10a; see also 13a.

tion, and awarded petitioner back pay and other appropriate relief.[11/]

The Fourth Circuit reversed each of the district judge's credibility determinations. The testimony of the petitioner, which had been credited by the trial judge, was denounced by the court of appeals as "hopelessly confused and contradictory."[12/] The court of appeals, conversely, credited the very defense testimony which had been rejected by the trial judge.[13/] The Fourth Circuit expressly dismissed the trial judge's reliance on demeanor, denouncing his decision as based on "a process of speculation or intuition rather than of legally justifiable inference from the evidence."[14/]

11/ 1a, 3a, 14a, 17a.

12/ 66a.

13/ See p. 19, infra.

14/ 62a.

REASONS FOR GRANTING THE WRIT

Certiorari Should be Granted To Resolve a Conflict Among the Circuits Regarding Whether Rule 52(a) F.R.C.P., Forbids Appellate Review of Trial Court Credibility Decisions

The decision of the Fourth Circuit in this case marks a widening of the complex division which exists among the courts of appeals regarding whether a district court decision about the credibility of a witness is subject to review on appeal. Trial court credibility decisions have long been regarded as the linchpin of the Rule 52 "clearly erroneous" standard. Rule 52(a) admonishes that on appeal

> due regard shall be given to the opportunity of the trial court to judge the credibility of witness.

At one time virtually all the courts of appeals held that such "due regard" pre-

cluded any appellate review whatsoever of credibility decisions.[15/] Although that remains today the majority rule,[16/] the Fourth Circuit with the opinion in this case joins the three other[17/] circuits which hold that credibility determinations must be reviewed and can be reversed on appeal.

The court of appeals in the instant case reconsidered and rejected the decision of the trial judge regarding the credibility of the key witnesses for the plaintiff and defendant. Such appellate review is impermissible as a matter of law in

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15/ See pp. 11-13, and notes 37-39, infra.

16/ Appellate review of credibility determinations is forbidden in the Third, Sixth, Seventh, Eighth, Ninth, Tenth and District of Columbia circuits. See pp. 11-13, infra.

17/ Appellate review of credibility determinations is also authorized in the First, Second, and Fifth Circuits.

seven circuits. The District of Columbia circuit insists that appellate courts "are not free to ... evaluate the credibility of witnesses."[18/] The Third Circuit rule is that "credibility is a matter to be determined by the trial judge, and not by the Court of Appeals".[19/] The Sixth Circuit has repeatedly held that "the credibility of the witnesses was for the trial court."[20/] Appellate panels in the

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18/ Socash v. Addison Crane Co., 346 F.2d 420, 421 (D.C. Cir. 1965); see also Orient Mid-East Lines, Inc. v. Cooperative for A.R.E., Inc., 410 F.2d 1006, 1009 (D.C. Cir. 1969). ("[I]t is not the function of this court to evaluate the credibility of the witnesses.")

19/ Grove v. First National Bank of Hermine, 489 F.2d 512, 515 (3rd Cir. 1973). There are seven other Third Circuit decisions barring appellate review of credibility determinations. See Appendix A.

20/ C.I.T. Corporation v. Janis, 418 F.2d 960, 968 (6th Cir. 1969); see also Sawyer

Seventh Circuit are "obligated to defer to the trier of fact on such matters as witness credibility.[21] The Eighth Circuit has refused since 1946 to review the credibility determinations of a district court.[22] In the Ninth Circuit "the trial court's appraisal of the credibility

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20/ continued

v. Arum, 690 F.2d 590, 592 (6th Cir. 1982) (appellate court not to "redetermine the credibility of witnesses); Franklin Life Insurance Co. v. William J. Champion and Co., 350 F.2d 115, 131 (6th Cir. 1965) ("The ... credibility of the witnesses w[as] for the trial court to determine ....")

21/ Tradert & Hoeffer, Inc. v. Praget Watch Corp, 633 F.2d 477, 479 (7th Cir. 1980). There are six other Seventh Circuit decisions barring appellate review of credibility determinations. See Appendix B.

22/ There are thirteen Eighth Circuit decisions barring appellate review of credibility determinations. See Appendix C.

of the witnesses is to be accepted; no challenge to such appraisal is permitted at the appellate level."[23/] In the Tenth Circuit "the credibility of a witness is for determination by the trier of fact and not by the appellate court."[24/] A total of 47 different decisions in these seven circuits expressly forbid the sort of appellate redetermination of credibility which occurred in this case.

On the other hand, three circuits in addition to the Fourth sanction appellate

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23/ Dunn v. Trans World Airlines, 589 F.2d 408, 414 (9th Cir. 1978). There are six other Ninth Circuit decisions barring appellate review of credibility determinations. See Appendix D.

24/ McKeel v. Merrill Lynch Pierce, Fenner & Smith, Inc., 419 F.2d 1291, 1292 (10th Cir. 1969). There are seven other Tenth Circuit decisions barring appellate review of credibility determinations. See Appendix E.

review of district court credibility decisions. The circuits applying this minority rule follow a wide variety of standards regarding when a trial court credibility judgment can be overturned. In the First Circuit there must be "a compelling showing of error."[25/] The most recent Second Circuit decision applies to credibility decisions the same "clearly erroneous" standard applicable to ordinary factual findings.[26/] The Fifth Circuit has enunciated no fewer than five different standards for deciding whether a credibility determination is to be overturned on appeal: (1) the existence of "clear

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25/ Oxford Shipping Co. v. New Hampshire Trading Corp., 697 F.2d 1, 5 (1st Cir. 1982).

26/ Langford v. Chrysler Motors Corp., 513 F.2d 1121, 1127 (2d Cir. 1975).

error",[27] (2) whether the credibility determination "proceeds upon a faulty theory",[28] (3) "only in the most unusual circumstances",[29] (4) where the credited testimony is "inherently incredible"[30] and (5) where the credibility determination is contradicted by "uncontrovertible evidence

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27/ Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188 (5th Cir. 1983); Oil Chemical & Atomic Workers v. Ethyl Corp., 703 F.2d 933, 935 (5th Cir. 1983); Robbins v. White-Wilson Medical Clinic, Inc., 660 F.2d 1064, 1066 (5th Cir. 1981); Marable v. H. Walker Associates, 644 F.2d 390, 395 (5th Cir. 1981); Williams v. Tallahassee Motors, Inc., 607 F.2d 689, 690 (5th Cir. 1979); Rodriguez v. Jones, 473 F.2d 599, 604 (5th Cir. 1973); United States v. Reddoch, 467 F.2d 897, 898 (5th Cir. 1972); Hodgson v. H. Morgan Daniel Seafoods, Inc., 433 F.2d 918, 920 (5th Cir. 1970).

28/ Henson v. City of Dundee, 682 F.2d 897, 912 (5th Cir. 1982).

29/ N.L.R.B. v. Jacob E. Decker and Sons, 569 F.2d 357, 364 (5th Cir. 1978).

30/ Marcom v. United States, 452 F.2d 36, 39 (5th Cir. 1971); Dillon v. M.S. Oriental Inventor, 426 F.2d 977, 978 (5th Cir. 1970).

or physical fact."[31] Other Fifth Circuit decisions announce less specifically that a trial judge's credibility determination, while reviewable on appeal, will not "lightly"[32] or "ordinarily"[33] be reversed.

The minority view that credibility decisions can be reviewed and reversed on appeal is a comparatively recent, although spreading, doctrine. Although Rule 52 was originally adopted in 1937, the first appellate decision sanctioning such review did not come until 1963.[34] The practice of

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31/ N.L.R.B. v. J.M. Machinery Corp., 410 F.2d 587, 590 (5th Cir. 1969); N.L.R.B. v. Dixie Gas, Inc., 323 F.2d 433, 437 (5th Cir. 1963).

32/ Verrett v. McDonough Marine Service, 705 F.2d 1437, 1443 (5th Cir. 1983); Pluyer v. Mitsui O. S. K. Lines, Ltd., 664 F.2d 1243, 1245 (5th Cir. 1982).

33/ Morgan v. Freeman, 715 F.2d 185, 186-87 (5th Cir. 1983).

34/ N.L.R.B. v. Dixie Gas, Inc., 323 F.2d 433, 437 (5th Cir. 1963).

reviewing trial court credibility determinations, which began in that year in the Fifth Circuit, was adopted by the Second Circuit in 1975,[35/] by the First Circuit in 1982,[36/] and in 1983 by the Fourth Circuit in the instant case. The majority view precluding such review was at one time accepted in the Second,[37/] Fourth[38/] and

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35/ Langford v. Chrysler Motors Corp. 513 F.2d 1121, 1127 (2d Cir. 1975).

36/ Oxford Shipping Co. v. New Hampshire Trading Corp., 697 F.2d 1, 5 (1st Cir. 1982).

37/ Dempster Brothers, Inc. v. Buffalo Metal Container Corp., 352 F.2d 420, 424 (2d Cir. 1965); Allstate Insurance Co. v. Aetna Casualty & Surety Co., 326 F.2d 871, 874 (2d Cir. 1964); United States ex rel. Bishop v. Watkins, 159 F.2d 505, 506 (2d Cir. 1947); United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945).

38/ Cannon, Inc. v. Plasser American Corporation, 609 F.2d 1075, 1075 (4th Cir. 1979).

Fifth[39/] circuits.

The Fourth Circuit opinion in this case represents the most extreme and outspoken decision among the circuits following the minority rule. The court of appeals here, expressly acknowledging that the trial judge's decision turned largely on his judgment of the credibility of the witnesses,[40/] held that "the district court's credibility assessments ... [were] a mistake."[41/] The district judge had held that plaintiff's testimony was "direct,

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39/ Somewhat inexplicably Fifth Circuit panels on a number of occasions since Dixie Gas in 1963 have announced that credibility determinations are not reviewable on appeal. Olgin v. Darnell, 664 F.2d 107, 108 (5th Cir. 1981); King v. Gulf Oil Co., 581 F.2d 1184, 1186 (5th Cir. 1978); Blunt v. Marion County School Board, 515 F.2d 951, 958 (5th Cir. 1975).

40/ 32a n.2, 59a, 60a, 63a, 64a, 72a.

41/ 72a.

"direct, straightforward, and believable."[42] The court of appeals disagreed, asserting that plaintiff's testimony was "hopelessly confused and contradictory",[43] "internally suspect",[44] and permeated by "demonstrable inconsistencies and ambiguities."[45] The district judge concluded that the testimony of defense witness Winchester was "general and weak",[46] and that Winchester "vacillated severely".[47] The court of appeals disagreed, insisting that Winchester's testimony "[f]airly assessed ... never evaded...."[48]

42/ 3a, 10a; see also 13a.

43/ 66a.

44/ 68a.

45/ 71a; see also 67a.

46/ 2a.

47/ 11a.

48/ 73a.

More importantly, the Fourth Circuit attacked as a matter of principle the idea that a trial judge could reject testimony on the basis of demeanor and credibility on the witness stand. The rejection of testimony on that basis, the Fourth Circuit complained, "required a process of speculation or intuition rather than of legally justifiable inference from the evidence."[49/] To reject a witness's testimony on the basis of credibility, the court of appeals repeatedly objected, would mean that the witness was "a racist and perjurer";[50/] a demeanor-based credibility assessment, the Fourth Circuit held, could not "serve as a rational basis for [such] critical fact findings...."[51/] In the final analysis,

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49/ 62a.

50/ 75a; see also 57a (witness lying), 63a (witness lying), 71a (perjury), 72a (perjury)m 65a (deliberate falsification).

51/ 63a-64a; see also 53a.

the court of appeals concluded, a Title VII defendant's explanation of its conduct could not be held to be pretextual merely because the trial judge refused to believe the defense witnesses. Such a trial court decision, the Fourth Circuit held, would necessarily be "on the basis of an intuition or insight whose probable accuracy lies beyond the capacity of an appellate court to review...."[52/] This passage literally stands on its head the rationale of Rule 52(a); in the Fourth Circuit, since there is no way appellate courts can review demeanor evidence, such evidence is apparently to be disregarded. And although this Court has repeatedly held that in a Title VII case a defendant's explanation of its behavior may be rejected as "unworthy

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52/ 84a-85a. (Emphasis added).

of credence",[53/] in the Fourth Circuit such credibility must somehow be assessed without regard to the demeanor of the critical witnesses.

Prior to the adoption of Rule 52, this Court on a number of occasions held that trial court credibility decisions could not be reviewed at all on appeal. "[S]o far as the finding of the ... judge who saw the witnesses 'depends upon ... the credibility of witnesses' ... it must be treated as unassailable." Adamson v. Galliland, 242 U.S. 350, 353 (1917); see also Davis v. Schwartz, 155 U.S. 631, 636 (1894). Decisions of this Court since the adoption of Rule 52 have consistently emphasized the importance of demeanor evidence.

53/ United States Postal Service Board of Governors v. Aikens, 75 L.Ed.2d 403, 410 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

> Face to face with living witnesses the original trier of fact holds a position of advantage from which appellate judges are excluded. In doubtful cases exercise of his power of observation often proves the most accurate method of ascertaining the truth.... How can we say the judge is wrong? We never saw the witnesses....

United States v. Oregon State Medical Society, 343 U.S. 326, 339 (1952). In United States v. General Motors Corp., 384 U.S. 127 (1966), the Court explained that "the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses ... is the rationale behind Rule 52(a)". 384 U.S. at 142 n. 16. Only two years ago this Court held that "Determining ... credibility ... is the special province of the trier of fact." Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 856 (1982).

The decision of the Fourth Circuit in this case thus strikes at the very heart of Rule 52(a). If the district judges are deprived of their traditional preeminent responsibility for assessing credibility, their role in the resolution of a case such as this will be little more than that of a special master supervising the conduct of depositions. Such an approach would inevitably subvert the principle that "factfinding is the basic responsibility of the district courts, rather than appellate courts," Pullman-Standard v. Swint, 445 U.S. 273, 291 (1982), and undermine Rule 52(a)'s limitations on the scope of appellate review. The conflict among the circuits on this issue reflects the competing values that are at stake. The allocation of factfinding responsibility mandated by Rule 52(a) requires, at the least, considerable deference to trial court

credibility assessments. On the other hand, the appellate courts could not meet their responsibility to reverse clear error, and to assure compliance with the law, if the mere presence of a single credibility issue totally immunized a trial court decision from review. The different balance struck by the circuits between these conflicting considerations underlies the wide variations in their construction of Rule 52(a). Those differences touch on all areas of civil litigation in the federal courts, affecting plaintiffs and defendants alike. Certiorari should be granted to resolve this complex and important disagreement among the circuits regarding the interpretation of Rule 52(a) and the allocation of fact finding responsibility between the district courts and courts of appeals.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

Third Circuit Decisions Regarding Review of Credibility Determinations

Taggart v. Wadleigh-Maurice, Ltd., 489 F.2d 434, 439 (1973) (appellate court cannot "resolve credibility issues" even in an action involving constitutional claims.)

HML Corporation v. General Foods Corporation, 365 F.2d 77, 82 (1966) credibility is an issue "peculiarly for [the] judgment" of the trial court.)

United States v. Cavell, 294 F.2d 12, 22 (1961) ("[I]t was for the trial judge to determine the credibility of the witnesses....")

Speed v. Transamerica Corporation, 235 F.2d 369, 373 (1956) ("[c]redibility was a matter to be resolved by the trial judge, not by us.")

Smith v. Lane, 174 F.2d 819, 821 (1949) ("It is hornbook

> law that an appellate tribunal in a civil suit will not redetermine the credibility of witnesses when, as here, the trial judge has had the opportunity to observe the demeanor of the key witnesses upon the stand and has reached a conclusion amply supported by evidence adduced at the trial".)

Drexler v. Koza, 156 F.2d 370 (1946) ("The conclusion upon the question of credibility is peculiarly one for the trier of the fact.")

Oliver v. Bell, 103 F.2d 760, 763 (1939) ("[T]he credibility of witnesses ... [was] for the determination of the trial judge who saw and heard the witnesses and his determination is binding upon us.")

APPENDIX B

Seventh Circuit Decisions Regarding Review of Credibility Determinations

City of Mishawaja, Ind. v. American Electric, etc., 616 F.2d 976, 979 (1980) ("We cannot better judge the credibility of those witnesses unseen by us than the trial judge.")

Denison Mines, Ltd. v. Michigan Chemical Corp., 469 F.2d 1301, 1310 (1972) ("We are not inclined to make a fresh appraisal of the credibility of witnesses whom the trial judge saw and heard.")

Brennan v. Midwestern United Life Insurance Co., 417 F.2d 147, 149 (1969) ("[W]e may not ... attempt to judge the credibility of witnesses.")

Metalexport Co. v. Gen-O-Ral Processing Corp., 365 F.2d 178, 180 (1960) ("It was the function of the trial court to determine the credibility of witnesses....")

Julien v. Sarkes Tarzian, Inc., 352 F.2d 845, 848 (1965) ("Any questions of credibility were, of course, for the District Judge".)

Matthews v. James Talcott, Inc., 345 F.2d 374, 381-82 (1965), cert. denied 382 U.S. 837 (1965) ("Questions of credibility were properly resolved by the district court and are not to be considered on appeal".)

Petri v. Rhein, 257 F.2d 268, 270 (1958) ("Rule 52 makes it unnecessary to discuss the findings made below.... [c]redibility of witnesses [is a] matter [] for the trial judge.")

APPENDIX C

Eighth Circuit Decisions Regarding Review of Credibility Determinations

Gibbons v. Bond, 668 F.2d 967, 968 (1982) ("It is for the trial court to judge the credibility ... of a witness's testimony")

Daniel Hamm Drayage Co. v. Waldinger Corp., 666 F.2d 1213, 1215 (1981) ("The credibility of the witnesses was for the trial court to determine.")

United States v. Poitra, 661 F.2d 98 (1981) ("It was for the trial court to determine the credibility of the witnesses. We will not disturb its findings.")

Cotton v. Lockhart, 620 F.2d 670, 671 (1980) ("The credibility of witnesses ... [is a] matter [] within the province of the district court.")

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman, 593 F.2d 129, 131 (1975). ("[I]t is not the function of an appellate court to ... pass upon the credibility of witnesses....")

Shull v. Dain, Kalman & Quail, Inc., 561 F.2d 152, 155 (1977), cert. denied 434 U.S. 1086 (1978) ("[I]t is not the function of an appellate court to ... pass upon the credibility of witnesses....")

Imperial Casualty Co. v. Carolina Casualty Co., 402 F.2d 41, 44 (1968) (credibility of witnesses was an issue "for the trial court.")

Dunlap v. Warmack-Fitts Steel Co., 371 F.2d 876, 879 (1967) ("The credibility of a witness ... is a matter which is left to the sound discretion of the trial court, who alone can observe the demanor of the witnesses ....")

Edgar v. Travelers Insurance Co., 351 F.2d 690, 691 (1965) ("credibility issues are to be resolved by the trial court .... [T]his court will not substitute its judgment for that of the trial court.")

Baker v. United States, 343 F.2d 222, 224 (1965) (quoting Geer-Melkus)

Anthony v. Louisiana & Arkansas Railway Co., 316 F.2d 858, 860 (1963) (quoting Geer-Melkus)

Geer-Melkus Construction Co. v. United States, 302 F.2d 181, 183 (1962) ("We will not attempt to substitute our judgment, based upon the cold record, for that of the trial court in determining credibility of witnesses.")

Anderson v. Federal Cartridge Corporation, 156 F.2d 681, 684 (1946) ("[W]e do not consider the credibility of the witnesses....")

APPENDIX D

Ninth Circuit Decisions
Regarding Review of Credibility
Determinations

White v. Washington Public Power Supply System, 692 F.2d 1286, 1289 (1982) ("[W]e do not review the credibility of witnesses as such.")

Northrop Architectural Systems v. Lupton Mfg. Co., 437 F.2d 889, 891 (1971) ("A determination of which expert is more credible will not be disturbed on appeal....")

DeWelles v. United States, 378 F.2d 37, 39 (1967) ("[A]n appellate court will assume that the lower court correctly measured credibility.")

Bonneville Locks Towing Co. v. United States, 343 F.2d 790, 792 (1965) ("We cannot ... pass upon the credibility of witnesses.")

Nuelsen v. Sorenson, 293 F.2d 454, 460 (1961) ("[T]he trial court's appraisal of the credibility of the witnesses is to be accepted, no challenge to such appraisal being permissible in the appellate court.")

Wittmayer v. United States, 118 F.2d 808, 811 (1941) ("[s]o far as the findings of the trial judge who saw the witnesses 'depends upon ... the credibility of witnesses' ... it must be treated as unassailable.")

APPENDIX E

Tenth Circuit Decisions Regarding Review of Credibility Determinations

Davis v. Cities Service Oil Co., 420 F.2d 1278, 1279 (1970) ([T]he trial court, not the appellate court, deter mines the credibility of witnesses".)

Wood v. Western Beef Factory, Inc., 378 F.2d 96, 99 (1967) ("[I]t is the trial judge who determines the credibility of witnesses.")

DeVilliers v. Atlas Corporation, 360 F.2d 292, 294 (1966) ("Determination of the credibility of witnesses is a function of the trial court -- not of the appellate court.")

Southwestern Investment Co. v. Cactus Motor Co., 355 F.2d 674, 676 (1966) ("The trier of facts -- not the appellate court -- determines the credibility of witnesses.")

Ruth v. Utah Construction & Mining Co., 344 F.2d 952, 953 (1965) ("Since the credibility of witnesses is a function peculiarly and properly for the trial court we cannot disturb the finding.")

Ruud v. American Packing & Provision Co., 177 F.2d 538, 541 (1949) ("Accepting, as we must, the judgment of the trial court as to the credibility of the ... witnesses....")

United Brotherhood of Carpenters, etc. v. Sperry, 170 F.2d 863, 867 (1948) ("[I]t is the province of the trial court to observe the witnesses ... [and] to appraise their credibility....")

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-79-069

==========

LULA B. MILLER,

Plaintiff,

v.

MERCY HOSPITAL, INC., d/b/a
MERCY HOSPITAL,

Defendant.

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MEMORANDUM OF DECISION

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I am of the opinion and rule that the defendant denied the plaintiff employment as a nurse's aide because of her race, and that appropriate relief should be granted.

The plaintiff is requested to draw appropriate findings of fact and conclusions of law and a proposed judgment.

Among the findings should be included findings that the plaintiff's application

was for a job as either a licensed practical nurse or a nurse's assistant; that at no time did she narrow her application to the job of licensed practical nurse; that the defendant had openings for such jobs and advertised them publicly and filled them with others not better qualified than plaintiff during the pertinent period; that when plaintiff called to inquire about the status of her application, she was told that the trouble was in her record from Presbyterian Hospital and that the Presbyterian Hospital history was the reason she was not employed. Ms. Winchester's denial of those facts was general and weak; and Ms. Marciniszyn, although she testified broadly about why plaintiff was not employed, finally said that she had no recollection of the situation and that she was simply reconstructing from the paper

record what she "would have done" based upon her normal practice.

Plaintiff's testimony is direct, straightforward and believable. She was denied employment because of her race, and specifically because she had made complaints of racial discrimination when she was working at Presbyterian Hospital.

This 7 day of January, 1982.

/s/
James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-79-69-N

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LULA B. MILLER,

Plaintiff,

v.

MERCY HOSPITAL, INC., d/b/a
MERCY HOSPITAL,

Defendant.

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SUPPLEMENTAL MEMORANDUM
OF DECISION

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This is an action under Title VII, 42 U.S.C. § 2000e. Plaintiff claims that Defendant denied her employment as a Nurse's Aide on August 14, 1974 on account of her race. Plaintiff seeks a declaratory judgment that Defendant unlawfully failed to hire her, and an award of back pay.

The case was tried to the Court on January 4, 1982. Based on the competent testimony at trial, the Court makes the following -

FINDINGS OF FACT

1. Plaintiff Lula Miller is Negro.

2. Defendant Mercy Hospital, Inc., operates the Mercy Hospital in Charlotte, North Carolina. Defendant is engaged in an industry affecting commerce and has had 15 or more employees for each working day in each of 20 or more calendar weeks at all pertinent times.

3. In 1970 Plaintiff received a high school diploma and in 1972 she received a Practical Nursing degree, both from Central Piedmont Community College in Charlotte. In 1968 she was employed by Presbyterian Hospital, Charlotte, North Carolina, as a Nurse's Aide; she was later promoted to Nurse Technician. After her

graduation from Central Piedmont Practical Nursing School, Presbyterian Hospital allowed her to function as a Licensed Nurse even though she had not then (and has not now) passed the State licensing examination. In July, 1973, Plaintiff voluntarily resigned from Presbyterian Hospital after having what she believed was a racial difficulty with her floor supervisor, which she could not adjust to her satisfaction with the Director of Nursing. Presbyterian Hospital reported to the North Carolina Employment Security Commission that Plaintiff "was unsatisfied with her working situation and made several errors in administering medication." When Plaintiff learned of the alleged reason for her termination, she had her attorney contact Presbyterian Hospital. She later filed a racial discrimination charge against Presbyterian Hospital with the Equal

Employment Opportunity Commission.

4. On August 14, 1974, about a year after her termination from Presbyterian Hospital, Plaintiff applied for employment with Defendant in response to a recurring advertisement in local newspapers that Defendant was seeking to hire LPNs and Nurse's Aides. On her application she indicated that her "type of work preferred" was "LPN," the last type work she had done at Presbyterian Hospital. After filling out her application she talked with Mrs. Winchester that she planned shortly to attempt, for the third time, to pass the State LPN examination. Mrs. Winchester told Plaintiff that Mercy Hospital had no openings as LPNs except for persons who had passed the State examination or who were recent graduates awaiting their first attempt to pass it. She then asked Plaintiff if Plaintiff would accept a job as a

Nurse's Aide. Plaintiff said she would. Mrs. Winchester then wrote "NA" (for "Nurse's Aide") in the "classification" blank of Plaintiff's application and told Plaintiff she would hear from her in a few days. Some time thereafter Mrs. Winchester called Presbyterian Hospital to inquire whether they recommended Plaintiff for employment. Mrs. Winchester had no recollection at trial of her conversation with Presbyterian, but the documents which she made at the time indicate that Presbyterian said that Plaintiff had performed very well as a Nurse's Aide but "could not function as an LPN, was unhappy when the hospital reported this on her 502 [Employment Security Commission Termination Notice], [and] had lawyer contact hospital." The Plaintiff's application was for a job as either nurse's aide or licensed practical nurse (LPN). She was qualified and expe-

rienced for both jobs, though not licensed as an LPN. At no time did the Plaintiff narrow or restrict her application to the LPN job only.

5. Plaintiff's application was forwarded to Casmira Marciniszyn, Defendant's Director of Nursing. Within a week after Plaintiff's application, Ms. Marciniszyn indicated that she was "not interested" in hiring Plaintiff. She testified at trial that she had no recollection of Plaintiff's application, but opined from looking at it that she rejected it forthwith because it was an application for an LPN position and Plaintiff had previously failed to pass her State Boards. Neither Ms. Marciniszyn nor Mrs. Winchester had any recollection whether the reference from Presbyterian Hospital accompanied Plaintiff's application at the time Ms. Marciniszyn reviewed it.

6. At the conclusion of her interview with Plaintiff, Mrs. Winchester had told Plaintiff she would let her know something within a few days. When Plaintiff heard nothing from her after several days, she telephoned to inquire whether she had been hired. Mrs. Winchester told her that Mercy could not hire her because of Presbyterian's reference. Mrs. Winchester refused to tell her what the reference had been, and said that she should go back to Presbyterian and see if she could straighten things out with them.

7. The Court believes Plaintiff's testimony, and in particular believes that Mrs. Winchester told Plaintiff that her reference from Presbyterian Hospital was the reason she was not hired. Plaintiff's testimony was direct, straightforward and believable. Mrs. Winchester had little recall of the occasion. She could not

recall whether the reference check accompanied the application when it was sent to the Director of Nursing, and could not explain why she would bother to obtain reference checks if they were not to be routinely used in evaluating applications for employment. She also vacillated severely when questioned as to whether Plaintiff's application was an application for a Nurse's Aide position. She testified that her entry of "Nurse's Aide" in the "qualifications" blank of the application indicated "the qualifications of the job that the interviewer [Winchester] thinks this person would qualify for," but nevertheless insisted that the application was for an LPN position because Plaintiff originally indicated, when filling out the application alone, that she "preferred" LPN work. Ms. Marciniszyn testified that she had no actual recollection of reviewing

Plaintiff's application, but held very firmly to the opinion that it was only an application for an LPN position. This reading of the application makes the "classification" blank useless, and means that the efforts of Mrs. Winchester to determine a best classification for an employee are ignored by the person who makes the hiring decision. Also, Jayne Murray, a white female, applied for employment two days before Plaintiff did. On her application neither the "type of work preferred" blank nor the "classification" blank are completed, yet Ms. Marciniszyn hired her as a Nurse's Aide. Under the theory she claims to have applied to Plaintiff, she would have conceded that Jayne Murray was not applying for any position.

8. Defendant had openings for Nurse's Aide when Plaintiff applied,

advertised them publicly all during August, 1974, and filled them with persons not better qualified than Plaintiff (as shown by Plaintiff's Exhibit 23). In 1971 Ms. Marciniszyn hired a white nurse despite her history of having cursed her supervisor, and did not fire this nurse a year later despite serious malingering. By contrast, in 1975 a black woman applied; her reference check revealed that at her former place of employment she was the "first black hired in office, caused some tension"; and Ms. Marciniszyn failed to hire her despite her being qualified for the position sought. Plaintiff's testimony was not impeached in any way; her application cannot be rationally passed off as being for an LPN position only, as Ms. Marciniszyn would have it; the reference check from Presbyterian had been received by Mercy before the decision not to hire

Plaintiff was made; and Ms. Marciniszyn hired and retained a "white troublemaker" but refused to hire a "black troublemaker."

The believable evidence bears out Plaintff's theory that Defendant's failure to hire her was on account of her race and specifically because she had made complaints of racial discrimination when she was working at Presbyterian Hospital.

10. On November 26, 1976, after Plaintiff had received from the Equal Employment Opportunity Commission a Determination holding that Presbyterian Hospital had discriminated against her on account of her race in discharging her, she went back to see Mrs. Winchester at Mercy Hospital and told her that this EEOC Determination cleared up the problem with Presbyterian Hospital and made her eligible for employment by Mercy. Mercy again declined to hire Plaintiff.

11. The burden of proof to satisfy the court of every fact necessary to support the decision in her favor remained upon Plaintiff throughout, and was entirely satisfied by the Plaintiff. The Defendant "artitulated" a reason for not employing her (that they thought Plaintiff applied for only an LPN [licensed practical nurse] job); but that reason was pretextual. The Plaintiff was denied employment because of her race, and because of her "racial problems at Presbyterian Hospital. She was unjustly treated as a black "trouble maker."

12. After being rejected by Defendant, Plaintiff sought appropriate substitute employment regularly from August 14, 1974 unitl she was finally reemployed by Presbyterian Hospital on May 26, 1980, as part of the settlment of her Title VII suit against them. She applied at

Belk's Department Store to work as a file clerk, applied at Mercy Hospital a second time, registered with the Associated Job Agency, replied to newspaper ads requesting file clerks, registered with the Employment Security Commission, and had 10 to 15 job interviews during the period she was out of work. She received $6,000.00 back pay as part of her settlement with Presbyterian Hospital. He pay would have been as follows during the period from August 14, 1974 to May 26, 1980, had she been employed by Mercy Hospital as a Nurse's Aide:

From	To	Hourly Rate	Pay
8-14-74	8-31-74	$ 2.32	$ 185.00
9-1-74	8-31-75	2.32	4,825.60
9-1-75	8-31-76	2.44	5,075.20
9-1-76	8-31-77	2.56	5,324.80
9-1-77	8-31-78	2.90	6,032.00
9-1-78	8-31-79	3.12	6,489.60
9-1-79	5-26-80	3.36	5,241.60
			$33,174.40

Based upon the foregoing Findings of Fact, the Court makes the following -

CONCLUSIONS OF LAW

1. The court has jurisdiction of the subject matter of this action. 42 U.S.C. § 2000e-5(f).

2. The Court has jurisdiction of the person of the Defendant.

3. The Defendant is an employer within the meaning of 42 U.S.C § 2000e(b).

4. Plaintiff has complied with the procedural requirements of 42 U.S.C. § 2000e-5(e), (f).

5. Plaintiff has clearly carried her burden of proving that Defendant discriminated against Plaintiff on account of her race (and specifically because Plaintiff made complaints of racial discrimination when she was working at Presbyterian Hospital) in failing to employ Plaintiff as

a Nurse's Aide on or shortly after August 14, 1974.

6. The Defendant's various explanations for failure to employ Plaintiff on or shortly after August 14, 1974, are pretextual.

7. Plaintiff is entitled to a judgment that Defendant's failure to hire her was unlawful, and is entitled to back pay, costs and counsel fees.

Done at Charlotte, North Carolina, this 22 day of February, 1982.

/s/
James B. McMillan
United States District Court
Judge

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 82-1323

Argued Jan. 12, 1983
Decided Oct. 31, 1983
Rehearing Denied Dec. 7, 1983

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LULA B. MILLER,

Appellee,

v.

MERCY HOSPITAL, INCORPORATED,
d/b/a, MERCY HOSPITAL,

Appellant.

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Richard F. Kane, Charlotte, N.C. (William L. Auten, Blakeney, Alexander & Machen, Charlotte, N.C. on brief), for appellant.
George Daly, Charlotte, N.C., for appellees.

Before PHILLIPS and ERVIN, Circuit Judges, HAYNSWORTH, Senior Circuit Judge.

JAMES DICKSON PHILLIPS, Circuit Judge:

This is a Title VII case in which Ms. Lula B. Miller, a black woman, sued Mercy Hospital, Inc. (Mercy), claiming discrimination on account of her race in Mercy's failure to hire her as a nurse's aide. Following bench trial, the district court found Mercy liable as Miller had alleged and awarded Miller substantial monetary relief, costs, and attorney fees.

On Mercy's appeal, we conclude that the district court's ultimate factual determination that Mercy intentionally discriminated against Miller was, on the whole record, clearly erroneous. We therefore reverse.

I

Lula B. Miller is a black women who for a number of years prior to this litigation had been employed in the general field

of nursing in Charlotte, North Carolina, where Mercy is located. The events leading to this litigation can be traced to her employment in 1968 by Presbyterian Hospital (Presbyterian), another Charlotte hospital, as a nurse's aide (NA). In 1972, having been promoted by Presbyterina in the interim to Nurse Technician, she graduated from Central Piedmont Nursing School, and stood for licensure as a practical nurse by taking the state's examination. At this point Presbyternian -- apparently in keeping with general custom among hospitals in the area -- allowed Miller to perform the functions of a licensed practical nurse (LPN) pending receipt of the results of her licensing examination. Unfortunately, Miller did not pass this examination; nor did she pass it on three subsequent takings prior to the litigation. Miller's employment in this capacity by Presbyterian

nevertheless continued until July of 1973 when she voluntarily resigned under circumstances discussed later in this opinion.

Within a month, according to her later testimony, Miller unsuccessfully applied to Mercy for employment in some nursing capacity. Around a year later, on August 14, 1974, Miller again applied for employment at Mercy in response to newspaper ads soliciting applications for LPNs and NAs. Miller's application was processed in a personal interview with a Ms. Dillie Winchester whose routine function this was. A typical written employment application form was used to record Miller's background and qualifications. It contained no formal entry for identifying the applicant's race, nor did Miller's completed form indicate her race by any special entry or by other manifest indicia. In a box marked "Type of work Preferred," Miller was

invited to indicate her preference, and in response she herself entered "LPN." In another box marked "Classification," Winchester then entered "N.A." reflecting, according to Winchester's later testimony, her judgment as applicant interviewer that this was the position for which Miller's application data revealed her to be qualified. According to Miller's testimony, she had indicated to Winchester that she, Miller, would be interested in a nurse's aide position as an alternative to her recorded preference for an LPN position.

Following normal procedures, Winchester then forwarded the completed application form to Ms. Casmira Marciniszyn, the Director of Nursing at Mercy, whose authority it then was to make this type of hiring decision for Mercy. Again in keeping with usual procedures, Winchester made a telephoned request of

Presbyterian for a reference on Miller. The results of this reference call are a matter of critical import in this litigation. The only direct evidence on the point was provided by Winchester's testimony. According to that testimony, Winchester entered the results of her report, immediately following its receipt, upon a standard reference form. The form, dated August 14, 1974, was introduced in evidence. As completed by Winchester, the form began "Lula W. (sic) Miller has applied to us for a position as 'NA. ...." In a rating grid on the form Winchester indicated that Presbyterian evaluated Miller "very good" "as N.A." but "Unsatisfactory" "as PN." In a note section on the reference form, Winchester summarized her conversation with the Presbyterian referee as follows: "could not function as an LPN. Was unhappy when the hosp[ital] reported

this on her 502 [North Carolina Employment Security Commission Separation Notice] had lawyer contact hospital." According to Winchester's later testimony, not directly contradicted, her contemporaneous entries on the reference form reflected in full the substance of the reference: she was told no more about the reasons for Miller's unhappiness" with Presbyterian than appeared on the form, nor was she told any more about the nature of the lawyer's "contact" with Presbyterian.

Marciniszyn received Miller's application in ordinary course. Within a week, under date of August 21, 1974, Marciniszyn made a "Not interested" entry upon the application and returned it to Winchester. This entry constituted Mercy's decision not to hire Miller based upon the August 14, 1974 application. The rejected application form was filed by Winchester along with the

reference form reflecting the Presbyterian reference report.

At the time of her decision not to hire Miller, it was impossible for Marciniszyn to have determined Miller's race solely from entries on the form. Whether she then knew Miller's race from any other source is obviously a matter of critical import. It is disputed by the parties. Marciniszyn testified in this litigation that she did not then know Miller's race. This testimony is not contradicted by any direct evidence. No specific finding of fact on the point was made by the district court. We return to the point in later discussion of th court's findings.

Neither is it apparent from any direct evidence of record whether Marciniszyn knew of the reference from Presbyterian at the time of her decision not to hire. Both Marciniszyn and Winchester later testified

that they did not recall whether it was ever brought to Marciniszyn's attention. No direct evidence contradicts this testimony, either as to the witnesses' states of recall at trial or as to the fact itself. It is only clear that the reference form was at some point filed by Winchester with the rejected application form return to her by Marciniszyn.

Marciniszyn's reason -- hence Mercy's -- for rejecting Miller's application was, according to Marciniszyn's later testimony, a simple one: she considered the application to be one for employment as a LPN, Miller's stated preference; Miller's application revealed her not qualified for that position because not lincensed;[1/]

1/ It is not disputed that though Mercy's policy at the time was to allow its own employees to function as de facto LPNs pending the results of licensing examination, it did not permit the new hiring of unlicensed persons to perform those func-

hence Marciniszyn, as hiring authority, was "not interested" in interviewing Miller as an applicant for employment. No direct evidence contradicts this proffered reason. Whether other evidence -- indirect, circumstantial -- sufficiently disproved it is the disputed, dispositive issue in the case.

Miller learned of the decision not to hire her sometime shortly after it was made. How she learned this and what she was told are not agreed between the parties. Miller's version, accepted by the trial court, was that she learned of her rejection by making telephoned inquiry of Winchester, and that Winchester told her the

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1/ continued

tions. It is therefore not disputed that Miller was not "qualified" for an LPN position under Mercy's general police. Her claim accordingly was treated and decided solely on the basis of Mercy's failure to her her as a NA.

reason was the negative reference she received from Presbyterian. Winchester testified that she did not recall Miller's having made any inquiry of her and that in any event she could not then have given Miller any specific reason because it was a matter known only to Marciniszyn to which Winchester was not then privy.

In November of 1974, Miller, represented by private counsel, filed an EEOC charge alleging racial discrimination by Presbyterian in its forwarding of negative references to Mercy and Charlotte Memorial Hospitals and, arguably, also alleging discrimination by the latter two hospitals in acting upon the references. The charge against Presbyterian alleged that the negative references were given because of Miller's complaint to Presbyterian of racially discriminatory treatment by that hospital. Mercy received no notice of this

charge at the time of its filing. In March of 1965 the EEOC's district director notified Miller that he had dismissed the charge as it might apply to Mercy, on the stated basis that the charge nowhere alleged that Mercy had any knowledge that any negative reference it received from Presbyterian was racially inspired. Mercy received no notice at that time of the dismissal of this charge. Perhaps significantly for the further course of this litigation, the district director, in an official communication explaining to Miller's counsel the basis for the dismissal, distinguished a case in which a negative employment reference had specifically identified a black charging party as "a troublemaker" who "was not averse to frivilously (sic) alleging racial discrimination." The director's letter concluded with the comment that "[w]e perceive no

impediment to amending" the charges to allege knowledge on the part of those respondents (Mercy and Charlotte Memorial) if your client believes that such knowledge did exist." Following a formal request by Miller's counsel for an opinion from the EEOC on the status of the charges against Mercy and Charlotte Memorial, the district director in April of 1975 advised Miller's counsel that the charges had been reopened and that "respondents" (presumably Mercy and Charlotte Memorial) would be notified. On February 6, 1976, Miller filed with the EEOC an "amended charge" alleging that Mercy had discriminated against her by failing to hire her in August of 1974. Mercy received formal notice of this charge on February 20, 1976, some sixteen months after its August 1974 decision not to hire Miller. So far as the record indicates, this was the first indication Mercy had

that it was the subject of any racial discrimination charges by Miller.[2/]

On November 26, 1976, while her EEOC charge against Mercy was pending, Miller returned to Mercy to apply for employment. Again she saw and was interviewed by Winchester, and again, except for agreement on the date of this second interview, the evidence of what transpired is in conflict. Miller's version is that she again applied for employment as a NA and that in this connection she showed Winchester an EEOC

2/ Though Mercy raises issues on this appeal respecting the administrative stages of Miller's proceeding, we decide the case on other grounds. Our extended recitation of the course of the protracted administrative process is included only because of its bearing upon critical credibility assessment made by the distirct court particularly as its confusion and duration may suggest the basis for confusion and failures to recall by witnesses on both side testifying much later to the critical events in issue.

probable cause determination letter finding that Presbyterian had indeed made a false entry, for racially discriminatory reasons, on Miller's state Employment Security Commission separation form. By Miller's later testimonial account, she had then pointed out to Winchester that this effectively removed any basis for Presbyterian's negative reference and established Miller's qualification for employment. Nevertheless, she was again not hired. Winchester's version of the November 26, 1976, interview, based upon a contemporaneously prepared memorandum that was introduced in evidence, was at flat odds with the essence of Miller's. According to Winchester, Miller flatly refused to apply for a position as NA -- on the basis that she was qualified for a better position -- and submitted no application. Winchester also testified that she had no recollection of

Miller's having shown her or spoken to her of an EEOC determination letter respecting Miller's charge against Presbyterian. The district judge accepted Miller's verision in a specific fact finding to which we return in later discussion.

Following exhaustion of the EEOC administrative procedures involving her charge against Mercy, Miller commenced this action on February 22, 1979. When commenced, the action included both Miller's individual claim of racial discrimination by Mercy in failure to hire her when she applied on August 14, 1974, and a class action claim in behalf of a putative class of black applicants for nursing positions similarly denied employment by Mercy from and after May 14, 1974. The class proposed was at first "conditionally certified" by the district court, but the class claim was later dismissed before trial when Miller

failed as class representative to demonstrate the existence of a class. Following a period of discovery, Miller's individual claim was tried to the district court in a one-day bench trial on January 4, 1982. In addition to a number of documentary exhibits the evidence consisted solely of the live testimony of Miller, Winchester and Merciniszyn.

On January 7, 1982, the district court entered a brief written memorandum of decision which announced its ruling that Mercy had racially discriminated against Miller as alleged and that appropriate relief should be granted. In the memorandum, plaintiff was requested to prepare appropriate findings of fact and conclusions of law and a proposed judgment. The gist of certain findings to be included was set out in the order. The order concluded with a determination that "Miller was

denied employment because of her race, and specifically because she made complaints of racial discrimination when she was working at Presbyterian Hospital."

Counsel for Miller submitted proposed findings, conclusions and judgment. So far as the record reveals, counsel for Mercy was not invited to comment upon nor object to the proposals either before or after their submission to the court nor to submit its own proposals, and did none of these. The proposed findings of fact included the substance of these suggested by the court and others originated by plaintiff's counsel. Subject to a few non-substantive editorial and grammatical revisions and the inclusion of two addditional findings of fact, one related to Mercy's proffered explanation of its failure to hire Miller and the other to Miller's qualifications for the positions sought, the court adopted

the findings and conclusions as drafted by plaintiff's counsel and entered judgment upon them for Miller. The judgment awarded Miller $27,174.40 in back pay; pre-judgment interest of $9,5000.00 and costs. This appeal followed.

II

Mercy has raised a number of issues on this appeal,[3/] but because we find reversible error in the district court's determination of liability vel non, we discuss only that completely dispositive issue.

As tried to the district court following dismissal of the class claim, this action had been reduced to a classic Title VII individual claim of disparate treatment

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3/ 1) Failure to file a timely EEOC charge; 2) clearly erroneous factual finding of discrimination; 3) error in awrding backpay; 4) excessive award of attorney fees.

in an isolated employment decision. As in such cases generally, the dispositive issue as originally joined was the narrow motivational one of whether the defendant's failure to hire plaintiff on an identified, single occasion was, in whole or part, on account of her race. 42 U.S.C § 2000e-2(a). As the district court correctly saw, the course of proof at trial further narrowed the ultimate issue of whether racially discriminatory animus or the proferred nondiscriminatory reason of plaintff's lack of qualification for the position perceived to be the one sought was the actual reason for the failure to hire. United States Postal Service v. Aikens, ___ U.S. ___, ___, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 408 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981). This ultimate motivational issue

was one of fact. Pullman-Standard v. Swint, 456 U.S. 273, 285-90, 102 S.Ct. 1781, 1788-91 (1982). Upon that narrow factual issue, Miller as plaintiff bore the burden of persuasion -- now merged with her continuing original burden to persuade the trier of fact that on the occasion in issue she had been the victim of intentional discrimination. Burdine, 450 U.S. at 256, 101 S.Ct. at 1095. Under controlling authority, this burden might be carried by proof by a preponderance of the evidence that the "discriminatory reason more likely motivated" Mercy, or that Mercy's "proffered explanation [was] unworthy of credence," being instead a pretext. Id.

The district court plainly saw this as the critical, dispositive issue of fact in the case[4/] and decided it in claimant's

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4/ It was obviously to sharpen and to focus upon this as the ultimately disposi-

favor in its factual finding on the ultimate liability issue.

> 11. The Defendant "articulated" a reason for not employing her (that they thought Plainitff applied for only an LPN [licensed practical nurse] job); but the reason was pretextal. The plaintiff was aenied employment becuse of her race, and because of her "racial problems at Presbyterian Hospital. She was unjustly treated as a black "troublemaker."

III

This ultimate motivational finding is challenged on appeal. We review it, along

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tive issue that the court added to the findings proposed by plaintiff's counsel the specific one quoted in text as Finding No. 11. Whether, as the district court found, plainitff had initialy made out a prima facie case is not before us, given tne course of trial. See Aikens, ___ U.S. ___, 103 S.Ct. at 1480. We think it an exceedingly close question.

with any subsidiary findings of fact upon which it is based, under the clearly erroneous standard of Fed. R. Civ. P. 52(a). Swint, 456 U.S. at 290, 102 S.Ct. at 1791. For reasons that follow, we pause briefly to consider the special application of that standard to motivational issues in Title VII litigation.

In the Supreme Court's oft-cited elaboration of the "clearly erroneous" standard, we have been instructed that "[a] finding is 'clearly erroneous' when although there is evidcence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committe." United States v. United States Gypsum Co., 338 U.S. 364, 396, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). Efforts at further refinement of this judgmental standard are not likely to give it much greater preci-

sion than does the Gypsum Co. formulation. Nevertheless, because in this case we are "left with a definite and firm conviction that a mistake has been committed" and because of the particular sensitivity of the standard's application to ultimate motivational issues in Title VII litigation, see, e.g., Swint, 456 U.S. at 275-77, 102 S.Ct. at 1783-84, we elaborate briefly upon our understanding of the ways in which an appellate court may properly be "convinced" that a "mistake" in fact-finding has been made.

We start with the proposition that such a conviction may not be based simply upon a perception derived from de novo review of the record that the "actual" facts are other than those found, see, id. at 290-98, 102 S.Ct. at 1791-92; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 28

L.Ed.2d 129 (1969). Closely related is the obverse proposition that the conviction of mistake need not rest upon any perception by the reviewing court that the "actual" facts are indeed different from those "found" (though it may obviously include such a subjective perception).[5/] Thus, the

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5/ Though in technical contemplation clearly erroneous review may rightly proceed with a completely neutral attitude toward what the "actual" facts may be it is of course inevitable that a reviewing court's conviction of mistake may sometimes include a conviction that the actual facts are other than those "found". See, e.g., Sanders v. Leech, 158 F.2d 486, 487 (5th Cir. 1946) ("testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and the right of the case") (emphasis added). Though occasionally they must exist, such convictions about the "truth" or "right" of a case are merely incidental to, not necessary predicates for, a reviewing court's conclusion that a finding is clearly erroneous. It is enough that the finding is "against the great preponderance of the evidence" in the record presented for review. A reviewing court's ability to discern the "truth" and "right" of a case presupposes that the

conviction of mistake may properly be based upon a conclusion that, without regard to what the "actual" facts may be, the findings under review were induced by an erroneous view of the controlling legal standard, see, e.g., United States v. Singer Manufacturing Co., 374 U.S. 174, 194 n.9, 83 S.Ct. 1773, 1784 n.9, 10 L.Ed.2d 823 (1963); MacMullen v. South Carolina Electric & Gas Co., 312 F.2d 662, 670 (4th Cir. 1963); or are not supported by the substantial evidence, Hodgson v. Fairmont Supply Co., 454 F.2d 490, 495 (4th Cir. 1972); or were made without properly taking into account substantial evidence to the contrary or are against the clear weight of the evidence considered as a whole, Jones

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record is also "true" and "right" (and complete) and this of course is beyond the court's ability and need.

v. Pitt County Board of Education, 528 F.2d 414, 418 (4th Cir. 1975); Sanders v. Leech, 158 F.2d 486, 487 (5th Cir. 1946). In sum, these establish that "clearly erroneous" review is properly focused upon fact-finding processes rather than directly upon fact-finding results. The appellate function is to insure that the process shall have been principled; the function is not authoritatively to find the "facts" in the first instance,[6/] or to affirm or deny that the facts "found" by the trial court are the "actual" facts of the case.

On this understanding, we are convinced that several mistakes in its fact-finding process render the district court's

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6/ Except perhaps in reviewing "constitutional" fact-finding, in taking judicial notice and, very occasionally and cautiously, when "facts" not found are manifest on the record.

critical findings of fact clearly erroneous. Primarily, we are convinced that the court's finding on the ultimate motivational issue as reflecting in finding No. 11, is not supported by the requisite preponderance of evidence.[7/] This is so whether in conceptual terms the court's finding was that as between the two proffered reasons the discriminatory one

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7/ This puts somewhat obversely the more common way of stating this particular basis for holding that a finding is clearly erroneous: that the finding is against the clear weight of the evidence. See, e.g., Jackson v. Hartford Accident & Indemnity Co., 422 F.2d 1272, 1275-78 (8th Cir. 1970)(Lay, J., concurring). Where, as here, the finding was in favor of a party having the burden of persuasion upon the issue, we believe the statement in text more accurately identifies -- and in appropriately minimal terms -- the precise mistake in the fact-finding process that is involved. To find mistake in this respect contemplates that there may have been substantial evidence -- if credible -- to support the finding. Whether there was such evidence in this case is a close question that we need not address in view of our holding stated in text. See id.

was the "more likely," or that the defendant's proffered reason was "unworthy of credence," i.e., "pretextual," or -- as is probable -- both. See Burdine, 450 U.S. at 256, 101 S.Ct. at 1095. Our reasons are as follows.

It is important at the outset of our review to identify the two opposing reasons for the challenged employment decision that were finally laid before the district court, hence the reason it accepted and the one it rejected in the end. The defendant's proffered reason was identified by the court as being Marciniszyn's understanding that Miller was interested only in an LPN position and her perception that for this position Miller was not qualified. For purposes of this appeal we can accept this as an accurate analysis of the nondiscrimi-

natory reason advanced by the defendant.[8/]

More critical is the court's identification of the specific discriminatory reason that it found established in conjunction with its rejection of the defendant's proffered reason. The discriminatory reason was identified in the court's critical finding No. 11: "Plaintiff was denied employment because of her race, and because of her 'racial' problems at Presbyterian Hospital. She was unjustly treated as a black 'trouble maker.'"

8/ The district court expressly found that Miller was "qualified and experienced" for both the LPN and NA positions, and had applied for both. This is no question, however, that Miller was not qualified, under Mercy's general policy, to be hired as a LPN. This is borne out by the court's determination that Mercy's violation was its refusal to hire Miller for the lower-paying NA position. Marciniszyn's proffered reason for failing to hire was, therefore, a valid one if, as is disputed, she perceived the application to be one only for a LPN position.

Though the "found" reason is stated conjunctively, first in general terms of "race" and then in specific terms of "racial troubles at Presbyterian Hospital," the record is compelling that the reason actually found was the more specific one -- that Miller was perceived by Marcin-iszyn, the decision-maker, to be a "black troublemaker." Neither the race-alone nor the "race-plus" reason could properly be found on the record in the case. The record clearly reveals why the district court sought to rest decision on the more narrow ground identified in its concluding "black troublemaker" elaboration.

Most critically, the evidence of record flatly negated any finding that race alone was the reason for the failure to hire Miller as a nurses aide. In statistical evidence intended to show a general climate of racial discrimination in Mercy's

employment practices, plaintiff succeeded in showing that blacks were freely employed by Mercy as nurses aides during Marciniszyn's tenure, and particularly around the time in issue. In 1974, almost sixty percent of the nurses aides at Mercy were black. Other blacks were freely hired as NAs around the critical date. Perhaps ironically, but nevertheless importantly, this evidence -- avowedly offered by Miller's counsel to demonstrate that Mercy employed blacks mainly in lower-paying positions -- effectively undercuts any claim by Miller that she was denied employment in such a position on account of her race alone.

Obviously aware of this development at the conclusion of the evidence, plaintff's counsel then deliberately staked out Miller's narrow claim for the first time in these terms: "Judge, I'm now ready to tell

you my theory of the case which I hadn't told you before. My theory of the case is that Mercy Hospital refused to hire Ms. Miller because she was a black trouble-maker." The court's ensuing findings of fact, culminating in ultimate Finding No. 11, make it plain that this was the specific factual theory of discriminatory motive accepted by the court.

In summary, the court's critical findings (express and implicit) of intentional discrimination ran as follows: Miller's August 14, 1974, application for employment was for either an LPN or NA postiion; this was known both to Winchester and to Marciniszyn; Marciniszyn also knew when she rejected Miller's application that Miller was a black who had experienced "racial troubles" in her prior employment; this led Marciniszyn to conclude that Miller was a "black troublemaker" and on

that specific basis to deny her employment; this actual reason was then deliberately concealed from Miller by Winchester's misleading response that the rejection was because of a negative reference of undisclosed nature from her former employer; the actual reason was further deliberately misrepresented by Marciniszyn that it was because of her perception that the application was only for a LPN position for which Miller was not qualified; Mercy's proffered reason, through Marciniszyn, was therefore "pretextual" in legal contemplation.

The district court's ultimate motivational finding must therefore be assessed on the basis of the "black troublemaker" theory. So assessed, it is clearly erroneous and cannot stand. To find that Mercy refused to hire Miller not simply because she was black but because she was perceived to be a "black troublemaker"

required leaps of inference that could not be made under the legal constraints imposed by applicable proof burdens and the requirements of demonstrable rationality in the fact-finding process.[9/]

The specific motivation in issue is indisputably that of Marciniszyn, acting with Mercy's authority upon Miller's application of August 14, 1974. It is to

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9/ We accept, for purposes of this appeal, the theoretical possibility of proving intentional racial discrimination on this narrow "race-plus" basis under circumstances conclusively shown to be free of any general racial bias in making comparable employment decisions. But we confess grave misgivings about the ability of courts fairly and rationally to assess the existence of such an amorphous special type of racial bias imbedded in a generally nondiscriminatory pattern of employment decisions. "Troublemaking" in the employment context is of course a many-faceted, perfectly justifiable basis for making negative employment decisions -- even bad ones. The attempt to discern troublemaking propensities made disqualifying only because of superimposed racial considerations may well tax judicial fact-finding processes beyond their capacity for fair and rational adjudication.

Marciniszyn, therefore, that the "black trublemaker" perception and motivational bias must be ascribed in order to justify this motivational finding. The only evidence arguably supporting such an ascription of knowledge and personal motivation is but distantly circumstantial. Motivation in this or any context may of course be proven circumstantially, and is usually only provable in this way in Title VII litigation, but here the circumstantial evidence supporting the inference is simply too attenuated when considered in light of the evidence as a whole to allow the inference.[10/]

10/ The normal principles that control the weighing of evidence by fact-finders apply in Title VII litigation. That Title VII is quintessentially remedial legislation, and that proving intentional race discrimination may be increasingly difficult as its more overt forms have been driven underground by the first wave of major Title VII litigation victories, does not justify ad

There are type major gaps that is logic had to be leaped in order to make the ultimate inference. The first had to do with Marciniszyn's knowledge in the first placd that Miller was black -- whether or not a "troublemaker." As indicated in our recital of the factual and procedural back-

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10/ continued

hoc judicial relaxations of the principles of rational proof that apply in civil litigation generally. The "liberal interpretation" that is appropriate because legislation is "remedial" in purpose is properly reflected only in substantive interpretation and in general rules easing normal proof burdens borne by litigants for whose benefit the legislation is enacted. The general proof scheme adopted by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 793, 83 S.Ct. 1817, 36 L.Ed.2d 668 (1973), featuring in its first stage a rebuttable presumption easing the normal production burden borne by Title VII disparate treatment claimants, is of course an example of the latter. That general rule represents the present limit of authoritatively approved relaxation of the normal burdens of production and persuasion borne by claimants in this type case.

ground, Marciniszyn denied in sworn testimony that she knew Miller's race at the time of her decision. Tending to support this is the fact that the application form did not specifically identify Miller by race nor give any manifest clues of race to anyone without special private knowledge that would allow the deduction from collateral indicia on the form.

Further supporting Marciniszyn's testimony is the testimony of Winchester, who did of course know Miller's race, that she had no occasion to and did not convey her knowledge to Marciniszyn. The district court made no specific findding that, despite this testimony, Marciniszyn did know Miller's race, but it is of course necessarily implicit in the ultimate "black "troublemaker" finding. This implicit finding therefore required an inference that despite the testimony of these two

Mercy employees, one of both was either deliberately lying under oath or had simply now forgotten that in fact Marciniszyn did know. In logic, Marciniszyn could only have known from unrevealed private inquiry outside the application form, by deducing Miller's race from other indicia on the form by reason of private knowledge making this possible, or from being told by Winchester or some other person. No direct evidence suggested any such source.

More critical is the gap respecting any perception of Marciniszyn that Miller was a black "troublemaker." The most relevant circumstancial evidence is Winchester's knowledge, derived from Presbyterian, that on one occasion, being unhappy with that employer, Miller had "contacted a lawyer" to pursue a grievance. That this grievance involved allegations of racial discrimination was, by Winchester's contem-

poraneous notes, not revealed to her. Winchester's testimony on trial was that it was not. Whether Marciniszyn even knew of this one episode of Miller's pursuing a grievance with a prior employer is not clear. For purposes of the appeal we can accept -- as the district court must implicitly have found -- that Marciniszyn did have access to the reference report prepared by Winchester. But if Marciniszyn knew more than the report revealed -- if she knew that the unspecified grievance was racial -- she could only have learned this from a source of whose existence again there is no direct evidence. Even if such knowledge be nevertheless inferred, there remained yet a further necessary inference: that this knowledge caused Marciniszyn to perceive Miller as a "troublemaker" whose race <u>in conjunction</u> with her troublemaking

propensity made her undesirable as an employee.

To make the required inferences despite the directly uncontradicted opposing evidence, the district court relied essentially upon credibility assessments in which it simply rejected the critical portions of Winchester's and Marciniszyn's testimony respecting their dealings with Miller's application. This was based upon the court's stated perception of the uncertainty of their testimonial recall of events, and the perceived internal ambiguity and logical implausibility of their accounts.

In assessing the opposing versions of what was intended, what understood, and what communicated about the reasons for rejection of the August 1974 application, the court explicitly accepted Miller's version, finding that her "testimony was

direct, straightforward and believable." In contrast, the court noted that both Winchester and Marciniszyn had "no recollection" at trial of the exact circumstances of the application's processing, and that Winchester had "little recall" of the follow-up "occasion" when, according to Miller, Winchester had reported to her that the application was rejected because of Presbyterian's negative reference. To substantiate its rejection of Winchester's versions of these events the court pointed to her "vacillation" in testifying about her understanding of the position for which the application showed Miller to be applying. To substantiate its rejection of Marciniszyn's testimony concerning her deciion to reject the application -- that she understood it to be for an LPN position for which Miller was not qualified by license -- the court pointed to evidence of

three other hiring episodes involving Marciniszyn that, for the court, tended to give the lie to Marciniszyn's proffered explanation. In one episode, two days after Miller's rejection, Marciniszyn had hired a white nurses aide whose application had no entry in either the "Classification" or "Type of Work Preferred" spaces. For the court, this undercut Marciniszyn's purported reliance upon the LPN entry in the "Position Preferred" space on Miller's application. In one of the other episodes Marciniszyn had allegedly declined, a year after Miller's rejection, to hire another black applicant whose former employer had indicated on a reference check: "first black hired in office, caused some tension"; while in the other, three years before Miller's rejection, she had hired a white applicant with known performance and disciplinary problems. For the court,

these two episodes in conjunction suggested a general bias on Marciniszyn's part against black as opposed to white "troublemakers" that supported its ultimate finding that this was the narrow basis upon which she rejected Miller's application.

With all respect, and after according the district judge's better vantage point the deference we must, we are convinced that the critical findings of intentional discrimination on the "racial troublemaker" tneory cannot be allowed to stand. More specifically, we are convinced that to find as the district court found on this ultimate issue of fact -- an issue upon which plaintiff had the burden of persuasion -- required a process of speculation or intuition rather than of legally justifiable inference from the evidence. We are therefore left with a definite and firm conviction that a mistake in the fact-

finding process has been made which renders the finding clearly erroneous. Because so to conclude is serious business, not lightly to be done, we explore the record in some detail to explain the basis for our conviction.

We look first to the court's credibility assessments. We do so because it is essentially on that stated basis that the court's ultimate finding is based. In the final analysis the inferential gaps are leaped by rejecting Marchiniszyn's testimony as "pretextual": as either deliberate lie under oath or honest memory somehow twisted 180 degrees from actual fact. Giving "due regard ... to the opportunity of the trial court to judge of the credibility of the witnesses," Fed. R. Civ. P. 52(a), we simply do not believe this credibility assessment can serve as a rational basis for the critical fact

findings here. The special advantage had by the trial court as opposed to ours in review of credibility assessments is in relation to the opportunity to observe witnesses' demeanor. But, of course, "[c]redibility involves more than demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2586, pp. 736-37 (1971). The district court suggested its reliance upon demeanor as a major component of its credibility assessment by contrasting the testimony of Marciniszyn and Winchester unfavorably with that of Miller in terms of their relative degrees of precision and assurance. Miller's testimony is characterized as "direct, straightforward and believable."

That of Marciniszyn and Winchester on the other hand is characterized variously as "vacillating," as indicating "no recall" or "no recollection" of the critical events in 1974, as internally inconsistent and as inconsistent with other evidence.

We have carefully reviewed the record -- including significant portions not included in the joint appendix -- and are persuaded that a more accurate characterization of the opposing testimony is that it reveals remarkably similar failures of recall and ambiguity -- with the greater degree of both on Miller's side. To characterize Miller's testimony as "direct, straightforwrd and believable" (a characterization, incidentally, that was drafted by plaintiff's counsel for inclusion in the court's findings) becomes highly questionable when critical portions of her testi-

mony at trial and by deposition[11/] -- portions not alluded to in the court's findings -- are considered.

An example is Miller's hopelessly confused and contradictory testimony about an earlier application for employment at Mercy than the one in issue. At length on her deposition, but only in a passing reference on trial, Miller testified that she had actually applied uncussessfully at Mercy a full year before the August 1974 application at issue in this case. If her deposition testimony is accepted, it was on this earlier occasion that Winchester first suggested that Presbyterian had given a negative reference that prevented Miller's employment by Mercy and that should be

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11/ Miller's full deposition was introduced in evidence by Mercy.

"cleared up." The improbability that, as Miller later testified, this experience with Winchester was repeated in all its essentials less than a year later, with no apparent recognition by Winchester of an earlier encounter, is manifest. That no more is involved than a simple confusion of dates is belied by Miller's firm insistence on deposition that there were two distinct encounters of this kind, the second being the object of this action. Neither the earlier encounter nor the ambiguities in Miller's testimony respecting it are noted in the direct court's findings.

Another example appears in Miller's testimony respecting her final encounter with Winchester, an occasion that, on the record, indisputably occurred some two years following the August 1974 rejection of her application, on November 26, 1976. On this occasion, Miller testified, she

exhibited to Winchester, who relayed to Marciniszyn, an EEOC determination letter finding, against Presbyterian, that that institution had indeed made a false official report concerning the circumstances of Miller's resignation from that institution and had done so for discriminatory reasons.[12/] The purpose of this testimony was presumably to confirm Miller's contention that Mercy's responsible employees knew all along that her troubles at Presbyterian had been racially inspired. Whatever the intended purpose of this testimony, it was internally suspect: the EEOC determination letter purportedly shown Winchester and Marciniszyn on November 26, 1976, bore a date indicating that its date

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12/ Miller's charge against Presbyterian was resolved by a settlement in which she was reinstated in 1980 and received backpay from that institution.

of issue was December 29, 1976.[13/].

There are other examples that tend to draw in question the essential accuracy of the court's characterization of Miller's testimony as "direct" and "straightforward" by way of contrast to that of Winchester and Marciniszyn. We mention only one. It deals with a rather critical issue. Miller testified that she told Winchester (in both her 1973 and 1974 encounters) of the nature

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13/ There may be an explanation for this apparent testimonial error -- e.g., an erroneous date or an earlier formal or informal letter or notice -- but if there is, it does not appear of record. By written brief, plaintiff's counsel specifically identified the letter dated December 29, 1976, as the one shown by Miller to Winchester on November 26, 1976. If there is an explanation, its absence on the record suggests, in any event, a failure by the fact-finder to note or to elicit an explanation of an apparent testimonial error of considerable import. Perhaps significantly, the finding on this matter was not one of those specifically directed by the district court; it originated with and was drafted in its final form by plaintiff's counsel.

of her racial difficulties at Presbyterian that led to her 1973 resignation. But on her 1974 application to Mercy, an application that, by Miller's account, she completed during here interview with Winchester, Miller entered as the reason for her leaving Presbyterian that she was having a baby, a fact verified in her other testimony.

We explore these instances in this much detail not to make, de novo, a contrary credibility assessment that rejects all of Miller's testimony, but simply to indicate our inability to accept the district court's stated perception that the inherent credibility of Miller's testimony provided a sufficient basis for accepting all of its critical content. We think the only fair characterization of Miller's testimony is that it was rendered at least as suspect as that of Winchester and

Marciniszyn by virtue of demonstrably failed recall, internal inconsistency, and contextual ambiguity. Indeed, to the extent it purported to be based upon confident, detailed recall of critical events occurring six to eight years ealier, its demonstrable internal inconsistencies and ambiguities render it more suspect than Winchester's and Marcinszyn's flat concessions of inability to recall those events with perfect fidelity.

There is of course always the possibility that protestations of inability to recall events are in fact merely the "stonewalling" technique at work. Trial judges are assuredly better situated to detect this special technique of perjury than are appellate courts sitting in review. But where, as here, the failure of recall asserted on one side are matched by unconceded but demonstrated failures of

equal or greater magnitude on the other and where, as here, a long lapse of time and the banality of the events as they occurred may well explain both sets of recall failures, it would seem a most questionable fact-finding process to reconcide them by completely forgiving one set of failures and ascribing the other to perjury by stonewalling. To the extent that this is what underlies the district court's credibility assessments here, we are convinced that a mistake in the fact-finding process has been made.

Nor do we see how the ambiguties and internal inconsistencies in the testimony of Winchester and Marcinszyn specially relied upon in the district court's findings have the negative weight ascribed them. Reliance is placed on Winchester's "vacillation" (we repeat, a characterization that originated with plaintiff's

counsel) in describing her understanding of the position that Miller was applying for. We have carefully reviewed Winchester's testimony on this point and are persuaded that this is not a fair characterization. A fairer characterization would be of understandably uncertain responses to a protracted course of cross-examination by Miller's counsel largely devoted to semantic quibbling about a point of only marginal relevance -- Winchester's perception, not Marciniszyn's, of what position Miller had applied for in the August 1974 application form. Fairly assessed, Winchester's testimony never evaded concession of the one relevant fact finally elicited: that she assumed that Marciniszyn would interpret the application as showing Miller qualified for a nurses aide position, and presumably, as indicating a desire to be considered for it. The impression is

inescapable that it simply took Miller's counsel more questioning that it should have to elicit the point and that this, rather than Winchester's vacillation, explains any difficulty experienced.

It is at this point that the greatest contextual ambiguity in the testimony of Mercy's witnesses occurs. Marciniszyn's stated perception that Miller's application should only be considered as one for LPN is at odds -- though not in direct conflict -- with Winchester's stated assumption that Marciniszyn would or might consider it for a NA position. No effort was made by these witnesses to reconcile the difference between the one's assumption and the other's perception. The evidence was left to speak as it lay -- to be accepted as a simple example of bureaucratic slippage or as evidence of Marciniszyn's deliberate

falsification or completely skewed memory of her actual state of mind. This shred of ambiguity is in fact the strongest bit of circumstantial evidence available to prove that Marciniszyn's actual motive was different from her professed motive, and, incidentally, to establish her as a racist and perjurer or as a racist with wholly failed memory -- the necessary implication of the ultimate finding of "pretext." We are convinced that it could not rationally be given that great probative force.

Finally, we think the other episode evidence relied upon to establish Marcinszyn's narrow, special bias -- against "black troublemakers" -- is simply too meager to tip the scales on that motivational issue. In the first place, three hiring episodes, over a period of four years, out of the great number in which Marciniszyn was demonstrably involved, is a

treacherously small sample from which to deduce a general mind-set of racial prejudice to be used in turn as inferential proof of specific discriminatory intent on the occasion in issue. Cf. Furnco Construction Corp. v. Waters, 438 U.S. 567, 580, 98 S.Ct. 2943, 2952, 57 L.Ed.2d 957 (1978)(evidence relevant to establish general pattern of discriminatory conduct). Particularly this is true when, as here, the uncontradicted evidence establishes a general pattern of hiring by Marciniszyn that belies any general bias against hiring blacks for the position in question.

Even more critically, the inferential force of the three episodes offered to establish the mind-set here is, upon inspection, so attenuated as to be of questionable relevance, not to say probative force. Marciniszyn's hiring of an applicant whose application form contained

no entries in the "Classification" or "Type of work Preferred" spaces was easily and spontaneously explained during her cross-examination on a basis perfectly consistent with her stated reason for rejecting Miller's.

The two purportedly contrasting episodes involving one black "troublemaker" and one white are of even more questionable force. There is, in the first place, no evidence, direct or circumstantial, that Marciniszyn or anyone at Mercy had ever seen the employment reference on the other supposed "black troublemaker."[14/] If it were nevertheless accepted that Marcinszyn had seen it -- perhaps by inferring that in

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14/ The evidence of this particular reference is of the most dubious relevance. The record does not indicate anything about the processing by Mercy of the application in question; it does not negate the possibility that employment was offered, nor indicate the ostensible reason for denying it if that was the outcome.

ordinary course she would have -- the reference was utterly ambiguous on the point. The report was merely that the hiring of the black had "caused some tension," with no inkling that this was because of troublemaking propensities of the black rather than racial prejudice of other employees. The episode involving the hiring of one white with known prior employment problems is of even more dubious relevance, particularly in view of the district court's total disregard of Mercy's countering evidence of the hiring within the critical period of two blacks with known prior employment problems of comparable quality.

We conclude this generally unwanted and always somewhat treacherous review of trial court fact-finding processes with a particularly distasteful, but necessary, reference to an aspect of the processes

employed here that bolsters our conviction of mistake. Mercy, as appellant has legitimately complained on appeal of the practice followed by the district court in formulating its findings of fact. We have earlier outlined the procedure: the court announced its general decision finding liability; requested plaintiff's counsel to prepare proposed findings, conclusions and judgment; then adopted those proposed with minor revisions and two additions and with no formal opportunity given opposing counsel either to submit proposed alternatives or specifically to object to those proposed before their adoption.

In a series of decision, most recently in Anderson v. City of Bessemer City, 717 F.2d 149 (4th Cir. 1983) and Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983), we have expressed varying degrees of dissaffection with and disap-

proval of the general practice. See also EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 639-41 (4th Cir. 1983)(citing cases). Whether, in light of our most recent pronouncement in Lilly, 720 F.2d at 331, we would be justified on this basis alone in rejecting the findings here as clearly erroneous, we need not decide. As indicated, we think there are more fundamental reasons for doing so here. Nevertheless, we are bound to note the strong possibility that the practice as followed here may have contributed significantly to the mistakes in the fact-finding process we have identified.

The special vice of this practice is not so much that it may actually induce a wholly blind, unreviewed adoption of proposed findings by trial judges. We doubt that this frequently occurs -- if ever it does. Certainly it did not occur

here, as is evidenced by the district court's obvious care in editorial revisions to the proposed findings, and in adding a critical finding on the ultimate motivational issue. The more realistic danger -- which we think fully exemplified here -- is that the practice tends to deflect the court's attention from, or actually to obscure, the more difficult factual issues and credibility problems presented by the evidence. The natural tendency of counsel given an opportunity free of adversary constraints to shore up weak points, to gloss over evidence or credibility problems at odds with necessary findings, and to argue inferences in the guise of "findings," is obvious. In effect, the practice gives to one side but not the other a final, second opporunity to argue the case to the fact-finder, free of rebuttal, and essentially ex parte. Though

tentative decision may by then have been reached, and may at the time reflect a firm judicial conviction, it is still at this point tentative -- the decisional process is still in progress. Though it still lies with disfavored counsel to note formal objections to findings after their adoption, Fed. R. Civ. P. 52(a), this, as every litigator knows, is but a poor substitute. At this point the judge's decision, not the adversary's proposed findings and concusions, must be challenged, and any fair opportunity to influence the decisional process in the trial court has in practical terms been lost.[15/]

Here we are satisfied that this potential vice of the practice almost certainly

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15/ Though post-finding objections or motions to amend may be made, they are not required in order to challenge findings on appeal. Fed. R. Civ. P. 52(b). This presumably reflects a concession of their usual futility.

skewed the fact-finding process. As our discussion has indicated, the findings as drafted by plaintiff's counsel and adopted by the district court were highly argumentative in form and notably selective in overemphasizing the probative force of some evidence while glossing over or wholly disregarding unfavorable evidence of obviously serious import. Of course we cannot know but what the district court would independently have come to the same findings by the same essential processes charted in the proposed findings, accepting exactly the evidence emphasized in counsel's draft proposals and rejecting all that disregarded in those proposals. We can only say with assurance that had defendant's counsel been given an equal opportunity before final decision was reached to force consideration of evidence opposing the findings adopted or to demon-

strate the rationality of contrary findings, we are satisfied that the district court would have been forced to critical reexamination of portions of the findings actually made.

We close as we began with the observation that the purpose of our review of the district court's dispositive findings of fact in this or any case is not to affirm or to deny that the "actual" facts of this controversy are as that court "found" them to be. Even as we adjudge the findings here to be clearly erroneous, we must be prepared to concede -- and do -- that by some process this experienced, sensitive, justly respected trial judge may indeed have "found" the "true" facts. We only have the power, and the responsibility, to say that on the evidence of record he could have done so only on the basis of an intuition or insight whose probable accuracy

lies beyond the capacity of an appellate court to review on any principled basis. Assessed according to legal standards of rationality in drawing inferences of motivation from raw historical facts in evidence and under controlling burdens of proof, the ultimate finding of discriminatory motivation in this case must be rejected as clearly erroneous.

REVERSED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1323

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LULA B. MILLER,

Appellee,

v.

MERCY HOSPITAL, INCORPORATED, ETC.,

Appellant.

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ORDER

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Upon consideration of the appellee's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Phillips for a panel consisting of Judge Phillips, Judge Ervin, and Judge Haynsworth.

For the Court,

/s/
William K. Slate, II
CLERK

No. 83-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LULA B. MILLER,

Petitioner,

vs.

MERCY HOSPITAL, INC.
d/b/a MERCY HOSPITAL.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR MERCY HOSPITAL, INC. IN OPPOSITION TO PETITION

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BRIEF FOR MERCY HOSPITAL, INC. IN OPPOSITION TO PETITION

The Purported "Issue" Presented By the Petition Would Not Arise and Should Not Be Decided Upon Any Review of the Circuit Court Decision in This Case

The Petition argues that the Court should rule definitively whether and to what

extent a trial court's credibility resolutions are subject to appellate review.

As Mercy Hospital will demonstrate below, this purported "issue" presented by the Petition would not arise and should not be decided upon any review of the Circuit Court decision in this case. Furthermore, no holding in the opinion below should advise the Court's discretion to review the unanimous panel decision or to remand the case upon the issue that the Petition asserts is presented.

Indeed, a lengthy brief in opposition is deemed unnecessary, because the well-written and legally sound analyses and conclusions set forth with painstaking care in the Circuit Court opinion argue very persuasively for themselves. This Brief will merely highlight certain portions of the

opinion below, conclusively demonstrating that the Circuit Court has applied only elemental, well-established elaborations by this Court and by the Circuit Courts upon the familiar "clearly erroneous" appellate review standard.

The Court will observe that the Petition misrepresents the eminently sound and familiar bases for the Circuit Court's conclusions, by quotations from the opinion that are violently torn from their contexts and by quotations containing editorial deletions that completely alter the plain meaning of the panel's carefully-chosen words. Seeking to persuade the Court that credibility resolutions based upon demeanor of witnesses have been "reversed", the Petition ignores the panel's plain holdings that it could not "refind" the facts and was not

doing so and that it could not make de novo credibility assessments and was not doing so.

Instead, the Circuit Court explicitly and correctly applied the familiar "clearly erroneous" review standard and concluded that the District Court's ultimate findings were "not supported by the requisite preponderance of evidence" or, "obversely" stated, were "against the clear weight of the evidence" (46a). Stating this conclusion, the Circuit Court held that "mistakes" in the "fact-finding process" required reversal of the District Court's decision. As shown below, these "mistakes" were carefully and thoughtfully specified and delineated, and the Circuit Court's review process and its ultimate conclusions were thoroughly

supported by undeniably settled and controlling authorities.

> "We review [the 'ultimate motivational finding'], along with any subsidiary findings of fact upon which it is based, under the clearly erroneous standard of Fed. R. Civ. P. 52(a). Swint, 456 U.S. at 290, 102 S. Ct. at 1791. For reasons that follow, we pause briefly to consider the special application of [the clearly erroneous] standard to motivational issues in Title VII litigation.
>
> "In the Supreme Court's oft-cited elaboration of the 'clearly erroneous' standard, we have been instructed that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 338 U.S. 364, 396 . . . (1948). Efforts at further refinement of this judgmental standard are not likely to give it much greater precision than does the Gypsum Co. formulation. Nevertheless, because in this case we are 'left with a definite and firm conviction that a mistake has been committed' and because of the particular sensitivity of the standard's application to ultimate motivational issues in Title VII

litigation, see, e.g., Swint, 456 U.S. at 275-77 . . ., we elaborate briefly upon our understanding of the ways in which an appellate court may properly be 'convinced' that a 'mistake' in fact-finding has been made.

"We start with the proposition that such a conviction [of mistake] may not be based simply upon a perception derived from de novo review of the record that the 'actual' facts are other than those found, see, id. at 290-98 . . .; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 . . . (1969). . . . Thus, the conviction of mistake may properly be based upon a conclusion that, without regard to what the 'actual' facts may be, the findings under review . . . were made without properly taking into account substantial evidence to the contrary or are against the clear weight of the evidence considered as a whole, Jones v. Pitt County Board of Education, 528 F. 2d 414, 418 (4th Cir. 1975); Sanders v. Leech, 158 F. 2d 486, 487 (5th Cir. 1946). In sum, these [authorities] establish that 'clearly erroneous' review is properly focused upon fact-finding processes rather than directly upon fact-finding results. The appellate function is to insure that the process shall have been principled; the function is not authoritatively to find the 'facts' in the first instance, or to affirm or deny that

the facts 'found' by the trial court are the 'actual' facts of the case.

"On this understanding, we are convinced that several mistakes in its fact-finding process render the district court's critical findings of fact clearly erroneous. Primarily, we are convinced that the court's finding on the ultimate motivational issue . . . is not supported by the requisite preponderance of evidence.7/. . .(40a-46a).

. . .

"With all respect, and after according the district judge's better vantage point the defference we must, we are convinced that the critical findings of intentional discrimination . . . cannot be allowed to stand. More specifically, we are convinced that to find as the district court found on this ultimate issue of fact -- an issue upon which plaintiff had the burden of persuasion -- required

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"7/ This puts somewhat obversely the more common way of stating this particular basis for holding that a finding is clearly erroneous: that the finding is against the clear weight of the evidence. See, e.g., Jackson v. Hartford Accident & Indemnity Co., 422 F. 2d 1272, 1275-78 (8th Cir. 1970) (Lay, J., concurring). . . ."

a process of speculation or intuition rather than of legally justifiable inference from the evidence. We are therefore left with a definite and firm conviction that a mistake in the fact-finding process has been made which renders the finding clearly erroneous. Because so to conclude is serious business, not lightly to be done, we explore the record in some detail to explain the basis for our conviction (62a-63a).

". . . Giving 'due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses,' Fed. R. Civ. P. 52(a), we simply do not believe this credibility assessment can serve as a rational basis for the critical fact findings here. The special advantage had by the trial court as opposed to ours in review of credibility assessments is in relation to the opportunity to observe witnesses' demeanor. But, of course, '[c]redibility involves more than demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.' 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2586, pp. 736-37 (1971) [Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963), cert. den. sub nom. Palermo v. United

States, 377 U.S. 953 (1964); and Jackson v. United States, 353 F. 2d 862, 866 (D.C. Cir. 1965)] (63a-64a). . . .

. . .

"We explore [witnesses' testimonies] in this much detail not to make, de novo, a contrary credibility assessment . . ., but simply to indicate our inability to accept the district court's stated perception that the inherent credibility of Miller's testimony provided a sufficient basis for accepting all of its critical content. We think the only fair characterization of Miller's testimony is that it was rendered at least as suspect as that of [the Hospital's witnesses] by virtue of demonstrably failed recall, internal inconsistency, and contextual ambiguity. . . .

". . . Trial judges are assuredly better situated to detect [a 'stonewalling'] technique of perjury than are appellate courts sitting in review. But where, as here, the failures of recall asserted on one side are matched by unconceded but demonstrated failures of equal or greater magnitude on the other and where, as here, a long lapse of time and the banality of the events as they occurred may well explain both sets of recall failures, it would seem a most questionable fact-finding process to reconcile them by completely forgiving one

set of failures and ascribing the other to perjury by stonewalling. To the extent that this is what underlies the district court's credibility assessments here, we are convinced that a mistake in the fact-finding process has been made (70a-72a).

. . .

"We conclude this generally unwanted and always somewhat treacherous review of trial court fact-finding processes with a particularly distasteful, but necessary, reference to an aspect of the processes employed here that bolsters our conviction of mistake. Mercy, as appellant, has legitimately complained on appeal of the practice followed by the district court in formulating its findings of fact. We have earlier outlined the procedure: The court announced its general decision finding liability; requested plaintiff's counsel to prepare proposed findings, conclusions and judgment; then adopted those proposed with minor revisions and two additions and with no formal opportunity given opposing counsel either to submit proposed alternatives or specifically to object to those proposed before their adoption.

"In a series of decisions, most recently in Anderson v. City of Bessemer City, 717 F. 2d 149 (4th Cir. 1983)

and Lilly v. Harris-Teeter Supermarkets, 720 F. 2d 326 (4th Cir. 1983), we have expressed varying degrees of disaffection with and disapproval of the general practice. See also EEOC v. Federal Reserve Bank of Richmond, 698 F. 2d 639-41 (4th Cir. 1983) (citing cases). . . .

". . . The . . . danger -- which we think fully exemplified here -- is that the practice tends to deflect the court's attention from, or actually to obscure, the more difficult factual issues and credibility problems presented by the evidence. The natural tendency of counsel given an opportunity free of adversary constraints to shore up weak points, to gloss over evidence or credibility problems at odds with necessary findings, and to argue inferences in the guise of 'findings,' is obvious. In effect, the practice gives to one side but not the other a final, second opportunity to argue the case to the fact-finder, free of rebuttal, and essentially ex parte. Though tentative decision may by then have been reached, and may at the time reflect a firm judicial conviction, it is still at this point tentative -- the decisional process is still in progress. . . .

"Here we are satisfied that this potential vice of the practice almost certainly skewed the fact-finding

process. As our discussion has indicated, the findings as drafted by plaintiff's counsel and adopted by the district court were highly argumentative in form and notably selective in overemphasizing the probative force of some evidence while glossing over or wholly disregarding unfavorable evidence of obviously serious import. . . . We can only say with assurance that had defendant's counsel been given an equal opportunity before final decision was reached to force consideration of evidence opposing the findings adopted or to demonstrate the rationality of contrary findings, we are satisfied that the district court would have been forced to critical reexamination of portions of the findings actually made.

"We close as we began with the observation that the purpose of our review of the district court's dispositive findings of fact in this or any case is not to affirm or to deny that the 'actual' facts of this controversy are as that court 'found' them to be. . . . Assessed according to legal standards of rationality in drawing inferences of motivation from raw historical facts in evidence and under controlling burdens of proof, the ultimate finding of discriminatory motivation in this case must be rejected as clearly erroneous" [Emphasis added.] (78a-85a).

The Circuit Court could hardly have more clearly specified that it was not disturbing any credibility resolutions by the trial court. The panel opinion does carefully exposit specific "mistakes" in the District Court's "process" of weighing the evidence it credited, concluding as a matter of law, in accordance with proper "clearly erroneous" standards, that the ultimate findings for Ms. Miller were not "supported by the requisite preponderance of evidence."

The Court of Appeals also properly concluded that the trial court's wholesale, uncritical adoption of findings written by Ms. Miller's counsel constituted a "mistake" affecting the fact-finding process and resulting in "mistaken" weighing of the evidence. As the Circuit Court noted, the District Court's adoption of an advocate's

one-sided proposed findings -- that conveniently ignore damaging admissions and unrebutted adverse evidence -- had on previous occasions been faulted by the Court of Appeals.

> ". . . [A] fair compliance with [Rule 52(a), Fed. R. Civ. P.] 'requires the trial court to find the facts on every material issue, including relevant subsidiary issues, and to "state separately" its conclusions thereon with clarity.' [Citations omitted.]
>
> "All these considerations prompted the Supreme Court in U.S. v. Crescent Amusement Co., 323 U.S. 173, 184-85 (1944), to comment that the adoption of 'findings [proposed by one of the parties to the suit and adopted by the trial judge] leave much to be desired in light of this function of the trial court,' under the Rules. This is so because an appellate court will '"feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered" when factual findings were not the product of personal analysis and determination by the trial judge' [citation omitted].

. . .

"The adoption by the district court of proposed findings and conclusions, though disapproved, will not, however, warrant reversal of the cause per se nor does it mean that the '"clearly erroneous"' rule of Rule 52(a) will not be applied at all, simply because the findings and conclusions were developed by one of the parties and adopted in course by the judge.

. . .

"When the findings of fact and conclusions of law adopted by the District Court have been given that 'careful scrutiny' by the appellate court that is required under such circumstances and have been 'more narrowly' examined . . ., and when, the reviewing court, on the entire record, 'is left [after such review] with the definite and firm conviction that a mistake has been committed,' United States v. Gypsum Co., 333 U.S. 364, 395 (1948), or it is convinced that 'the result in a particular case does not reflect the truth and right of the case,' Armstrong Cork Co. v. World Carpets, Inc., 597 F. 2d 496, 501 (5th Cir. 1979), cert. denied, 444 U.S. 932, it is the duty of the appellate court to

reverse the findings and conclusions as clearly erroneous."

Equal Employment Opportunity Commission v. Federal Reserve Bank of Richmond, 698 F. 2d 633, 640-642 (4th Cir. 1983)

It is respectfully submitted that these rulings, fully supported by controlling authorities, do not suggest any possible ground or reason for review or remand by this Court.

Conclusion

Upon all of the foregoing, Mercy Hospital, Inc. earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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